

1 Rene L. Valladares  
2 Federal Public Defender  
3 Nevada State Bar No. 11479  
4 \*Alicia R. Intriago  
5 Assistant Federal Public Defender  
6 California State Bar No. 320102  
7 411 E. Bonneville Ave., Ste. 250  
8 Las Vegas, Nevada 89101  
9 (702) 388-6577  
10 Alicia\_Intriago@fd.org

11 \*Attorney for Petitioner Robert William Downs, II

12 UNITED STATES DISTRICT COURT  
13 DISTRICT OF NEVADA

14 Robert William Downs, II,

15 Petitioner,

16 v.

17 Tim Garrett, Warden of Lovelock  
18 Correctional Center; James Dzurenda,  
19 Director of Nevada Department of  
20 Corrections,<sup>1</sup>

21 Respondents.

Case No. 3:22-cv-00075-RCJ-CLB

**First Amended § 2254 Petition**

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<sup>1</sup> Petitioner Downs asks that the Court substitute Respondent State of Nevada with Respondents Tim Garrett, the warden of Lovelock Correctional Center where Mr. Downs is housed, and James Dzurenda, the Director the Nevada Department of Corrections.

## PROCEDURAL HISTORY

### I. State Court Proceedings

On May 29, 2013, the State charged Petitioner Robert Downs and co-defendant Allison Alamo in Reno Justice Court with various charges stemming from the alleged neglect and abuse of Allison's 7-year-old son, N.B. 05/29/2013 Complaint. The State charged Downs with one count of kidnapping in the first degree and three counts of abuse, neglect, and/or endangerment of a child resulting in substantial bodily harm and/or mental abuse. 05/29/2013 Complaint. Around this time, attorney Bruce Lindsey began representing Downs. *See* 10/11/2013 Substitution of Attorney.

On September 25, 2013, there were grand jury proceedings in the Second Judicial District Court. Tr. 09/25/2013. An indictment issued that same day charging Downs with: kidnapping in the first degree (Count I) and four counts of abuse, neglect and/or endanger a child resulting in substantial bodily harm and/or mental harm (Counts II, III, IV). 9/25/2013 Indictment.

On October 10, 2013, Theresa Ristenpart appeared on behalf of Downs. 10/10/2013 Notice of Appearance. On or about January 9, 2014, Downs entered a guilty plea to Counts II and III of the Indictment for felony child abuse. 1/09/2014 Guilty Plea Memorandum.

On April 15, 2014, at the date scheduled for sentencing, the court noted that Downs had filed a motion to withdraw his guilty plea and to withdraw his attorney. 4/15/2014 District Court Minutes. In Risterpart's motion to withdraw counsel, she noted that she had substituted into the case in October 2013, that a plea offer was on the table only until January 2014, and that she was waiting on approval for expert funding. She informed the district attorney of this over email, but the district attorney refused to give Downs and Ristenpart more time. Therefore, when Ristepart received the report from Godoy, she immediately moved to withdraw and for Downs

1 to withdraw his plea. 4/16/2014 Motion to Withdraw Defense Counsel and Appoint  
2 Conflict-Free Counsel at 2-5.

3 On June 6, 2014, the district court appointed Scott Edwards to represent  
4 Downs at the hearing on the motion to withdraw counsel and withdraw his guilty  
5 pleas. 6/06/2014 Notice of Appearance of Counsel. The court held a hearing on the  
6 motions on June 19, 2013, and both Downs and Ristenpart testified. 6/19/2014  
7 District Court Minutes; 6/19/2014 Tr.

8 On July 23, 2014, the court granted the motion to withdraw Downs's guilty  
9 plea. 7/23/2014 Order. The following day the court denied the motion to withdraw  
10 counsel. 7/24/2014 Order. On August 14, 2014, Downs filed a renewed motion to  
11 appoint conflict-free counsel and noted that the district court had filed an ethical  
12 complaint against Ristenpart for her action on Downs's case. 8/14/2014 Motion for  
13 Leave to Withdraw as Attorney of Record. The court again appointed counsel free  
14 counsel for this hearing. 12/12/2014 Order setting oral argument.

15 On September 3, 2014, John Ohlson filed a notice of appearance as Downs's  
16 new court-appointed attorney to represent him at the motion to withdraw counsel.  
17 9/03/2014 Notice of Appearance. On December 4, 2014, Ohlson moved to withdraw as  
18 counsel after realizing he had a conflict of interest. 12/04/2014 Motion to Withdraw  
19 Counsel. On December 18, 2014, the court granted Ohlson's motion. 12/18/2014  
20 District Court Minutes. On January 6, 2015, Scott Edwards filed a notice of  
21 appearance as counsel. 1/06/2015 Notice of Appearance of Counsel.

22 Before trial, the State filed two motions in limine: one regarding the  
23 admissibility of character evidence of Downs's co-defendant, N.B.'s biological father,  
24 and three women who told police they had reason to think Downs's had abused N.B;  
25 and another asking the court to allow N.B. to testify via Skype from his new home in  
26 the United Kingdom. 1/16/2015 State's In Limine Motion Regarding Admissibility of  
27

1 character evidence; 3/03/2015 Motion In Limine Regarding Testimony Of Child By  
2 Alternate Means.

3 Edwards failed to file an opposition to the motion and on March 4, 2015, the  
4 court granted the first motion regarding character evidence. 3/04/2015 Order.  
5 Edwards also failed to file a response to the motion to allow N.B. to testify via skype.  
6 *See* 3/17/2015 Tr. at 4-5 (Judge Sattler noting that no response was filed and that  
7 generally a failure to oppose means the motion will be granted, but because this  
8 motion affected Downs's confrontation clause rights, he would address the State's  
9 arguments and relevant case law). On March 17, 2015, when the court asked Edwards  
10 whether he intended to file an opposition and request to hold a hearing, Edwards  
11 stated that they did not oppose the motion and Downs confirmed. *See id.* at 5.

12 On March 31, 2015, Downs sought appointment of an investigator, specifically  
13 Kenneth Peele, to "contact potential witnesses and procure additional documentation  
14 for the trial." 3/31/2015 Motion for Appointment of Investigator at Public Expense.<sup>2</sup>  
15 At no point prior to trial did Edwards file a notice of expert witnesses or notice of  
16 witnesses, although the State did both. 3/13/2015 Notice of Expert Witnesses  
17 Pursuant to NRS 174.234; 5/20/2015 Notice of Witnesses Pursuant to NRS 174.234.  
18 On the first day of trial, during the State's opening, they alleged the following:

19 During the period of March 2013 through May 16, 2013, Lindsey Phillips, the  
20 manager of an apartment complex called the MacGregor Inn in Reno, observed Downs  
21 and a boy, N.B., come into her office. 6/01/2015 Jury Trial at 264-65. At that point in  
22 time, Phillips believed N.B. was being abused based upon his physical state and his  
23 demeanor and decided to call Child Protective Services, even alerting Downs that she  
24 was doing so. *Id.* at 266-267. A social worker, Ryan Boren, then arrived on scene with  
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26 <sup>2</sup> The court docket includes two notices regarding payment of fees for an  
27 investigator and an expert, but the undersigned attorney is unable to access these  
documents because they are sealed.

1 Reno police officers, and they took N.B. to the hospital, where Dr. Catherine Wagoner  
2 examined N.B. and believed N.B.'s injuries were the result of abuse or neglect. *Id.* at  
3 268-270. On that same day, on May 16, 2013, police interview Downs and N.B.'s  
4 mother, separate from one another, at the police station. *Id.* at 270.

5 In its Opening Statement, the State continued recounting the alleged series of  
6 events: on May 17, 2013, Detective Harms interviewed N.B. at the police station. *Id.*  
7 at 273. N.B. detailed incidents involving Downs, including: roughhousing where  
8 Downs allegedly punched N.B., sometimes hard with a closed fist; Downs disciplining  
9 N.B., which consisted of N.B. holding cans, doing push-ups and sit-ups, taking cold  
10 showers and baths; Downs tying N.B. up by his hands and feet and carrying N.B. or  
11 making N.B. walk to the bathtub, where N.B. had a washcloth in his mouth and  
12 Downs would dunk his head under water. *Id.* at 274-75. When Detective Harms  
13 followed up with N.B. the following day, N.B. told the detective that Downs also  
14 choked him to the point that N.B. lost his vision. *Id.* at 275-76.

15 In its final statements to the jury during its Opening Statement, the State set  
16 forth the following evidence as the basis for the four charges against Downs:

17 What evidence the State will present [for the child abuse  
18 charges] is that roughhousing, Robert Downs punching  
19 him repeatedly causing him injury, [is] one of the counts [of  
20 child abuse]. One of the counts is tying [N.B.'s] hands and  
21 feet up and actually—and gagging him and putting him  
22 under the water. And then finally one of those child abuse  
23 counts is the actual strangulation of [N.B.] by Mr. Downs.

24 *Id.* at 279.

25 During its case-in-chief, the State presented testimony from the following  
26 witnesses: Lindsay Phillips (the manager of the MacGregor Inn); Diane Crowley (a  
27 tenant at the MacGregor Inn); Detective Scott Johnson; social worker Ryan Boren;  
Detective Zachary Doser; Dr. Catherine Wagoner; N.B.; Detective Ashley Harms;  
Bonnie Kaufman (principal at California elementary school where N.B. was a second-

1 grader before he moved to Reno); and Andrew Bowser (a mental health counselor who  
2 counseled N.B.). *See generally* 6/1/2015 Jury Trial Transcript, 6/2/2015 Jury Trial  
3 Transcript. 6/03/2015 Jury Trial Transcript at 581-759.

4 In his defense, Edwards presented the testimony of Tara Godoy, a forensic  
5 nurse. 6/3/2015 Jury Trial Tr. at 751-778.

6 During jury deliberations, the jury sought to clarify the intent required for  
7 first-degree kidnapping. 6/04/2015 Jury Question #1. The court responded by  
8 directing the jurors to instructions No. 21 and 22. 6/04/2015 Court Response to Jury  
9 Question #1. After deliberating for approximately four hours, the jury returned guilty  
10 verdicts on all four counts. 6/04/2015 Verdicts; *see also* 6/04/2015 Trs.

11 On July 17, 2015, one of the jurors wrote a letter to the court informing the  
12 court that he had felt pressured into finding Downs guilty of first-degree kidnapping  
13 and asked that this be taken into consideration for sentencing. 7/20/2015 Notice of  
14 Document Received and Considered by the Court; *see also* 11/12/2015 Tr. at 4-5.

15 On July 21, 2015, Edwards filed a motion to withdraw from Downs's case.  
16 7/21/2015 Motion to Withdraw as Counsel for Defendant. Richard Cornell  
17 represented Downs at the hearing on Edwards's motion to withdraw. 8/18/2015 Tr.  
18 at 3. After hearing from Edwards, the court denied the order. *Id.* at 18-19.

19 On November 12, 2015, the court sentenced Downs to 5 to life on the first-  
20 degree kidnapping conviction with a consecutive sentence of 96 months to 240 months  
21 for each child abuse conviction with the child abuse convictions running concurrently  
22 to one another. *See* 11/17/2015 Judgment of Conviction. Edwards withdrew from the  
23 case on November 23, 2015. 11/23/2015 Order.

## 24 **II. Direct Appeal**

25 Richard Cornell represented Downs on direct appeal. 12/03/2015 Notice of  
26 Appearance. On December 6, 2015, Downs filed a notice of appeal. 12/06/2015 Notice  
27 of Appeal.

1 On March 22, 2016, Downs filed his Opening brief, raising the following issues on  
2 appeal:

3 Claim One: Down's Fifth, Sixth and Fourteenth  
4 Amendment rights to a fair trial and due process were  
5 impinged when the trial court committed plain error in not  
6 giving a "Mendoza" Instruction

7 Claim Two: The evidence if insufficient under *Jackson v.*  
8 *Virginia*, 443 U.S. 307 (1979), to sustain a guilty verdict on  
9 Count I, first degree kidnapping

10 Claim Three: The trial court abused its discretion and  
11 violated Downs's Fifth, Sixth, and Fourteenth Amendment  
12 rights to due process and a fair trial when it allowed a  
13 "mental health counselor II" to opine that the child victim  
14 had PTSD and reactive attachment disorder, and was the  
15 most traumatized child he had seen in 20 years

16 Claim Four: The trial court committed reversible error and  
17 violate Downs's Fifth, Sixth and Fourteenth Amendment  
18 rights to due process and a fair trial when it allowed a  
19 conviction of NRS 200.508(1)(a)(2) upon proof of any degree  
20 of mental harm resulting to the child, even if not  
21 substantial

22 Claim Five: The trial court violated Downs's Fifth, Sixth,  
23 and Fourteenth Amendment rights to due process of law  
24 and to a fair trial when It allowed the interviewing  
25 detective to state prejudicial opinions that were  
26 inadmissible

27 Claim Six: The trial court violated Downs's Fifth, Sixth,  
and Fourteenth Amendment rights to a fair trial,  
confrontation and cross-examination of witnesses and due  
process when it allowed the victim to testify by skype

3/22/2016 Opening Brief. The State filed an Answering Brief and Downs replied.  
6/14/2016 Respondent's Answering Brief; 6/23/2016 Appellant's Reply Brief. The  
Nevada Supreme Court affirmed but found two errors. 6/28/2017 Order of Affirmance.  
The Nevada Supreme Court found that the trial court gave an erroneous jury

1 instruction pursuant to NRS 200.508(1) and that it was error to permit a detective to  
2 testify about the nature of the alleged victim's injuries, but it ultimately found that  
3 neither error prejudiced Downs and affirmed his convictions. *Id.* at 6-9. On July 25,  
4 2017, remittitur issued. 7/25/2017 Remittitur.

### 5 **III. State Post-Conviction Proceedings**

6 On June 4, 2018, Downs filed a pro per petition for writ of habeas corpus and  
7 a motion for appointment of counsel. 6/04/2018 Petition; 6/04/2018 Motion.

8 In his pro petition, Downs raised the following claims:

9 Ground One: counsel failed to interview a known witness—  
10 tenant living in MacGregor Inn unit #229—who would  
11 have provided exculpatory testimony which contradicted  
12 the weak and inconsistent testimony given by prosecution  
13 witness

14 Ground Two: counsel failed to interview known witness—  
15 tenants living in MacGregor Inn unit #119— who would  
16 have provided exculpatory testimony which contradicted  
17 the weak and inconsistent testimony given by prosecution  
18 witness

19 Ground Three: counsel failed to interview known witness—  
20 tenant living in MacGregor Inn unit #170— who would  
21 have provided exculpatory testimony which contradicted  
22 the weak and inconsistent testimony given by prosecution  
23 witness

24 Ground Four: counsel failed to research and investigate a  
25 meaningful defense instead relying on prosecutor's files

26 Ground Five: counsel failed to research and investigate a  
27 meaningful defense instead choosing to demonstrate the  
prosecutor's inability to prove every aspect of the charges

Ground Six: counsel failed to research and investigate a  
meaningful defense which would have produced physical  
evidence supporting petitioner's claims of innocence, as  
exemplified by "at least one impartial medical report which  
fully supported the petitioner's claims made to various law  
enforcement officers during questioning and interrogations



1 and resulted in this evidence not being introduced during  
2 trial and therefore prejudicing petitioner” (cleaned up)

3 Ground Seven: counsel failed to research and investigate a  
4 meaningful defense by failing to procure expert witnesses  
5 to “properly evaluate the alleged victim due to his  
6 ADHD/RAD diagnoses as well as his various behaviors that  
7 would have supported petitioner’s claims and expert  
8 testimony would have provided evidence that would have  
9 contradicted allegations of abuse” (cleaned up)

10 Ground Eight: counsel failed to research and investigate  
11 case file in order to provide an informed recommendation  
12 regarding plea offers from prosecution

13 Ground Nine: counsel failed to interview Diane Crowley  
14 who claimed to have heard unusual sounds coming from  
15 petitioner’s home

16 Ground Ten: counsel failed to: investigate child’s ADHD  
17 diagnosis; secure a medical expert to testify regarding the  
18 inconsistent use of Vyvanse, a medication used to treat the  
19 alleged victim’s ADHD, as the side-effects mirror many of  
20 the inflicted injuries claimed by prosecution; investigate  
21 claims of neglect of victim made while living in California;  
22 request pediatric evaluations of child in order to determine  
23 alternative explanations for the physical issues that  
24 prosecution claimed were abuse, investigate the child’s  
25 history of self-abuse while living in California as well as  
26 the strong possibility of this behavior increasing in  
27 frequency and severity due to acting out; investigate the  
alleged victim’s school records where it was documented  
that the alleged victim would frequently come to school  
dirty and smelling of urine; request pharmacy experts to  
testify to the medications effects on the alleged victim’s  
weight and bruising; investigate allegations made by the  
alleged victims’ teacher regarding suspicions of the alleged  
victim’s mother and her possible drug use.

Ground Eleven: counsel failed to investigate physical  
evidence prosecution claimed was used to bind and gag the  
alleged victim by failing to have these items tested for DNA

1 Ground Twelve: counsel failed to move for suppression of  
2 evidence where petitioner was in custody during the first  
3 interrogation on May 16, 2013, and was never read his  
*Miranda* rights

4 Ground Thirteen: counsel failed to move for suppression of  
5 evidence where petitioner informed police, prior to the  
6 start of the second interrogation on May 21, 2013,, that he  
7 had been experiencing a migraine and had taken  
prescription narcotic

8 Ground Fourteen: counsel failed to move for suppression of  
9 evidence where multiple photographs were used solely for  
the purpose of inciting the passions and emotions of the  
jury

10 Ground Fifteen: counsel failed to move for suppression of  
11 evidence where several items, alleged to have been used to  
12 bind and gag child, were never tested for DNA

13 Ground Sixteen: counsel failed to move for suppression of  
14 comments made by alleged witness who neither testified  
15 nor signed filed statement (Michelle Paquin, who lived in  
MacGregor Inn unit #221)

16 Ground Seventeen: counsel failed to file motion to impeach  
17 prejudicial and/or biased testimony of state witnesses,  
18 specifically: Diane Crowley, Lindsay Phillips, Bonnie  
Kaufman, Catherine Wagoner, Andrew Bowser, Detective  
19 Johnson, Detective Zachary Doser, Detective Ashley  
Harms

20 Ground Eighteen: counsel failed to call child's foster father  
21 to stand as a defense witness since the foster father had  
22 reported to a pediatrician that the alleged victim was "the  
23 clumsiest child he had ever seen in all the years he had  
been a foster-parent"

24 6/04/2018 Pro Per Petition at 12-28.

25 On June 26, 2018, the court appointed Edward Reed to represent Downs.  
26 6/26/2018 Recommendation and Order for Appointment of Counsel. On November 26,  
27

1 2018, counsel filed a supplemental petition for writ of habeas corpus. 11/26/2018  
2 Supplemental Petition. It included one additional claim:

3           Downs's trial and appellate counsel were ineffective  
4           because they did not argue that the kidnapping statute as  
5           applied to Mr. Downs conduct was ambiguous and did not  
6           give fair warning to Mr. Downs that this activity could be  
7           considered kidnapping, as it has never before been applied  
8           in the state of Nevada to the conduct of which Mr. Downs  
9           was convicted.

10 The State answered the petition and supplemental petition on January 1, 2019.  
11 1/10/2019 Answer.

12           Ultimately an evidentiary hearing occurred on February 10, 2020. Before the  
13 hearing, Reed filed a memo indicating that he intended to call Richard Cornell only.  
14 2/07/2020 Petitioner's Hearing Memorandum for Evidentiary Hearing.

15 At the evidentiary hearing on February 10, 2020, Reed abandoned all claims in the  
16 pro per petition. 2/10/2020 Tr. at 10. There is no indication that Reed ever engaged  
17 in any investigation of the claims in the pro per petition.

18           The court issued its order on March 23, 2020, denying the supplemental  
19 petition and noting that Downs had agreed to dismiss all grounds in the Petition and  
20 argue only the grounds contained in the supplemental petition. 3/23/2020 Order at 3.

21           On April 24, 2020, Downs filed a Notice of Appeal. 4/24/2020 Notice of Appeal.  
22 In his Opening Brief, he raised only the issue he had raised in the supplemental  
23 petition, i.e., whether the kidnapping statute was unconstitutional as applied to his  
24 case. 10/09/2020 Appellant's Opening Brief. The State filed an Answering Brief and  
25 Downs replied. 11/23/2020 Respondent's Answering Brief; 2/05/2021 Appellant's  
26 Reply Brief.

27           The Nevada Supreme Court affirmed the lower court's ruling. 11/10/2021  
Order of Affirmance. Remittitur issues on January 7, 2022. 1/07/2022 Remittitur.

1 **IV. Federal Court Proceedings**

2 On January 27, 2022, Downs mailed his pro se petition to the Federal District  
3 Court for Nevada. On May 12, 2022, the Court appointed the Federal Public Defender  
4 of Nevada to represent Downs. ECF No. 6. The undersigned attorney filed her notice  
5 of appearance on June 10, 2022. ECF No. 10.

6 This amended petition now follows.

7 **STATEMENT REGARDING 28 U.S.C. §2254(D)**

8 For each claim in this petition, Downs alleges any rulings from the Nevada  
9 appellate courts denying him relief on the merits are (or would be) (1) contrary to,  
10 and/or an unreasonable application of, clearly established Federal law, as determined  
11 by the Supreme Court of the United States; and or (2) are (or would be) based on an  
12 unreasonable determination of the facts in light of the evidence presented in the State  
13 court proceeding.

14 Downs also asserts for the purposes of further review that the standard of  
15 review in 28 U.S.C. 2254(d) violates the U.S. Constitution, specifically the Suspension  
16 Clause (Article One, Section Nine, clause two); fundamental principles of separation  
17 of powers (Articles One, Two, Three); the ban on cruel and unusual punishments  
18 (Amendments Eight and Fourteen); and the guarantee of due process (Amendments  
19 Five and Fourteen). *But see Crater v. Galaza*, 491 F.3d 1119 (9th Cir. 2007) (rejecting  
20 some of these arguments).



1 During jury deliberations, about four hours after the jury had begun  
2 deliberating, a juror sent a question which read, “If someone commits an unlawful  
3 act, is there then any intention or intent to perpetrate an unlawful act?” 6/4/2015 Tr.  
4 at 899. In response, the court direct the jury to Instructions No. 21 and 22. Id. at 905.  
5 Less than an hour later, the jury returned with guilty convictions on all charges,  
6 including the first-degree kidnapping conviction. *See* 6/4/2015 Tr. at 899, 907-908;  
7 6/04/2015 Verdicts.

8 The following month, in July 2015, a juror wrote and sent a letter to the court  
9 regarding his reluctance to find Downs’s guilty of first-degree kidnapping and the  
10 pressure he felt to return a guilty verdict on this count. 7/20/2015 Notice of Document  
11 Received and Considered by the Court. The juror’s extreme discomfort and pressure  
12 to find Downs’s guilty of this offense despite the insufficiency of the evidence  
13 demonstrates prejudice because the insufficient evidence had a substantial and  
14 injurious effect on the jury’s verdict.

15 Any contrary ruling by a state court was contrary to, or involved an  
16 unreasonable application of, clearly established federal law, and/or involved an  
17 unreasonable determination of the facts adduced in the state court record. *See* 28  
18 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

19 **Ground Two: Counsel was ineffective for failing to challenge the sufficiency**  
20 **of the evidence on the first-degree kidnapping charge, in violation of**  
21 **Downs’s right to the effective assistance of counsel under the Sixth and**  
22 **Fourteenth Amendments.**

22 Statement of Exhaustion:

23 This claim is unexhausted, but a version of this claim was raised on direct  
24 appeal and decided by the Nevada Supreme Court in its Order of Affirmance.  
25 3/22/2016 Opening Brief; 6/14/2016 Answering Brief; 6/23/2016 Reply Brief;  
26 6/28/2017 Order of Affirmance; 7/25/2017 Remittitur.

1 Relevant legal standard for all ineffective assistance of counsel claims<sup>3</sup>:

2 “The question of whether a defendant has received ineffective assistance of  
3 counsel at trial in violation of the Sixth Amendment is a mixed question of law and  
4 fact and is thus subject to independent review.” *Strickland v Washington*, 466 U.S.  
5 668, 668 (1984). Under this two-prong test, a defendant who challenges the adequacy  
6 of his or her counsel’s representation must show (1) that counsel’s performance was  
7 deficient, and (2) that the defendant was prejudiced by this deficiency. *Id.* at 687.

8 Statement of Facts in Support of Claim:

9 Downs incorporates the facts and legal standards set forth in Ground One into  
10 this claim as well as Ground Three.

11 Counsel was ineffective for failing to challenge the sufficiency of the State’s  
12 evidence as to first-degree kidnapping. The State’s theory of the case was that the  
13 physical restraint and movement of N.B. was part the child abuse inflicted upon  
14 N.B.—the State argued in its opening statement that Downs tying N.B. up by his  
15 hands and feet and carrying N.B. or making N.B. walk to the bathtub, where N.B.  
16 had a washcloth in his mouth and Downs would dunk his head under water, was child  
17 abuse. 6/01/2015 at 274-75. At no point did Edwards challenge the sufficiency of the  
18 evidence as to the first-degree kidnapping charge. There was no strategic reason for  
19 Edwards not to challenge the sufficiency of the evidence, and it was objectively  
20 unreasonable. But for Edwards’s failure to do so, there is a reasonable probability the  
21 outcome of Downs’s underlying criminal proceedings would have been different.

22 Any contrary ruling by a state court was contrary to, or involved an  
23 unreasonable application of, clearly established federal law, and/or involved an  
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26  
27 <sup>3</sup> Downs incorporates this legal standard in all subsequent grounds alleging  
ineffective assistance of counsel.

unreasonable determination of the facts adduced in the state court record. *See* 28 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

**Ground Three: Counsel was ineffective for failing to ask the trial court for a jury instruction informing the jury that to convict Downs of both first-degree kidnapping and child abuse, the State had to show that the movement of the child required for the kidnapping charge was not incidental to the related child abuse charge, in violation of Down's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.**

Statement of Exhaustion:

This claim is unexhausted, but a version of this claim was raised on direct appeal and decided by the Nevada Supreme Court in its Order of Affirmance. 3/22/2016 Opening Brief; 6/14/2016 Answering Brief; 6/23/2016 Reply Brief; 6/28/2017 Order of Affirmance; 7/25/2017 Remittitur.

Statement of Facts in Support of Claim:

Under Nevada law, when a person is charged with kidnapping and a separate associated offense, an additional instruction is required to distinguish that the factual basis for the kidnapping is independent of the associated offense. *Garcia v. State*, 121 Nev. 327, 330 334-35, 113 P.3d 836, 838, 841 (Nev. 2005). This is commonly called a *Mendoza* instruction based upon a case of the same name. In that case the Nevada Supreme Court suggested that a jury be instructed that, to find a defendant guilty of both kidnapping and an associated offense, it must find beyond a reasonable doubt that any movement of the victim was not incidental to the associated offense, that any incidental movement of the victim substantially increased the risk of harm to the victim over and above that necessarily present in the associate offense, that any incidental movement of the victim substantially exceeded that required to complete the incidental offense, that the victim was physically restrained and such restraints substantially increased the risk of harm to the victim, or the movement or restraint



1 had an independent purpose or significance. *Mendoza v. State*, 122 Nev. 267, 275-76,  
2 130 P.3d 176, 181 (Nev. 2006).

3 Here, Edwards never sought to have this instruction read to the jury, which  
4 would have made clear that the State had to establish beyond a reasonable doubt the  
5 factual basis for the kidnapping charge was not incidental to the factual basis for the  
6 child abuse charge. There was no strategic reason not to request this instruction, and  
7 it was objectively unreasonable for Edwards not to ask for it. But for Edwards's  
8 omission, there is a reasonable probability that the outcome of Downs's underlying  
9 criminal proceedings would have been different.

10 Any contrary ruling by a state court was contrary to, or involved an  
11 unreasonable application of, clearly established federal law, and/or involved an  
12 unreasonable determination of the facts adduced in the state court record. *See* 28  
13 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

14 **Ground Four: Counsel was ineffective for failing to object to erroneous**  
15 **instructions on child abuse, in violation of Down's right to the effective**  
16 **assistance of counsel under the Sixth and Fourteenth Amendments.**

17 Statement of Exhaustion:

18 This claim is unexhausted, but a version of this claim was raised on direct  
19 appeal and decided by the Nevada Supreme Court in its Order of Affirmance.  
20 3/22/2016 Opening Brief; 6/14/2016 Answering Brief; 6/23/2016 Reply Brief;  
21 6/28/2017 Order of Affirmance; 7/25/2017 Remittitur.

22 Statement of Facts in Support of Claim:

23 Under NRS 200.508(1)(a)(2), the crime of child abuse resulting in substantial  
24 bodily harm and/or mental harm requires the jury to find that either the child  
25 suffered substantial mental harm or substantial bodily harm. In Jury Instruction No.  
26 24, the jury was advised it needed to find only mental harm, not substantial mental  
27 harm, to find Downs guilty of child abuse. The Nevada Supreme Court found that  
this failure to include the modifier "substantial" was error; therefore, counsel was

1 ineffective for failing to ensure that the instruction included this modifier. *See*  
2 6/28/2017 Order of Affirmance at 6-7. This error prejudiced Downs. But for counsel's  
3 error, there is a reasonable probability the outcome of Downs's underlying criminal  
4 proceedings would have been different.

5 Any contrary ruling by a state court was contrary to, or involved an  
6 unreasonable application of, clearly established federal law, and/or involved an  
7 unreasonable determination of the facts adduced in the state court record. *See* 28  
8 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

9 **Ground Five: Counsel was ineffective for failing to object to Detective**  
10 **Doser's testimony commenting on Downs's credibility and also expressing**  
11 **quasi-medical opinions about the causes of N.B.'s injuries, in violation of**  
12 **Down's right to the effective assistance of counsel under the Sixth and**  
13 **Fourteenth Amendments.**

14 Statement of Exhaustion:

15 This claim is unexhausted, but a version of this claim was raised on direct  
16 appeal and decided by the Nevada Supreme Court in its Order of Affirmance.  
17 3/22/2016 Opening Brief; 6/14/2016 Answering Brief; 6/23/2016 Reply Brief;  
18 6/28/2017 Order of Affirmance; 7/25/2017 Remittitur.

19 Statement of Facts in Support of Claim:

20 Counsel was ineffective for failing to object to Detective Doser's testimony  
21 about Downs's credibility and the cause of N.B.'s injuries. Doser testified that N.B.  
22 lost his vision because of pressure put on his carotid arteries and that the  
23 hemorrhaging in N.B.'s eyes was caused by a lack of oxygen from attempted  
24 drowning. 6/02/2015 Jury Trial Tr. at 460, 511. The Nevada Supreme Court found  
25 that allowing this testimony was error as it amounted to an expert opinion. *See*  
26 6/28/2017 Order of Affirmance at 8-9.  
27

1 Counsel's failure to object to this testimony was objectively unreasonable; but  
 2 for this error, there is a reasonable probability that the outcome of Downs's  
 3 underlying criminal proceedings would have been different.

4 Any contrary ruling by a state court was contrary to, or involved an  
 5 unreasonable application of, clearly established federal law, and/or involved an  
 6 unreasonable determination of the facts adduced in the state court record. *See* 28  
 7 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

8 **Ground Six: Trial counsel was ineffective for permitting the child to testify**  
 9 **via Skype and for failing to effectively cross examine the child in violation**  
 10 **of Downs's confrontation right and right to effective assistance of counsel**  
 11 **under the Sixth and Fourteenth Amendments.**

12 Statement of Exhaustion:

13 This claim is unexhausted, but a version of this claim was raised on direct  
 14 appeal and decided by the Nevada Supreme Court in its Order of Affirmance.  
 15 3/22/2016 Opening Brief; 6/14/2016 Answering Brief; 6/23/2016 Reply Brief;  
 16 6/28/2017 Order of Affirmance; 7/25/2017 Remittitur.

17 Statement of Facts in Support of Claim:

18 The Confrontation Clause of the Sixth Amendment provides that "[i]n all  
 19 criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the  
 20 witnesses against him." U.S. Const. amend VI. This is because "[t]he central concern  
 21 of the Confrontation Clause is to ensure the reliability of the evidence against a  
 22 criminal defendant by subjecting it to rigorous testing in the context of an adversary  
 23 proceeding before the trier of fact." *Maryland v. Craig*, 497 U.S. 836, 845 (1990).  
 24 Therefore, the admission of out-of-court hearsay statements is prohibited unless the  
 25 witness is unavailable and was subject to a prior opportunity for cross-examination.  
 26 *See Crawford v. Washington*, 541 U.S. 36, 68 (2004) ("Where testimonial evidence is  
 27 at issue . . . the Sixth Amendment demands what the common law required:

1 unavailability and a prior opportunity for cross-examination”); *see also Bruton v.*  
2 *U.S.*, 391 U.S. 123 (1968).

3 As noted above, the State sought to have N.B. testify via Skype from the United  
4 Kingdom, and Edwards did not object.

5 During the portion of the trial in which N.B. testified, there were repeated  
6 issues with the technology through which the State and defense counsel questioned  
7 N.B. For example, N.B. indicated that the prosecutor had frozen during the direct  
8 examination and re-direct examination. 6/03/2015 Jury Trial Tr. at 619-648.  
9 Edwards’s cross-examination of N.B. was also curtailed because of the connection  
10 issues. *See id.* at 647. During the cross-examination, N.B. also told the court that his  
11 father and stepmother were also in the room while he testified. *Id.* at 642. Much of  
12 Edwards cross-examination of N.B. was irrelevant—he asked N.B. if he played sports,  
13 what kinds of toys he liked, if he had legos, Edwards asked about N.B. living with his  
14 grandparents in Reno and what he liked to eat there. *See generally id.* at 643-647.

15 When the connection completely vanished during the State’s re-direct of N.B.,  
16 the court enquired if Edwards wanted to further question N.B., to which he replied  
17 “no.” 6/03/2015 Jury Trial Tr. at 649-650.

18 Edwards didn’t question N.B. about his testimony on direct examination that  
19 he could not recall if Robert ever punched him, which was the factual basis for one of  
20 the child abuse charges. *Id.* at 639. Thus, the only factual basis for that claim came  
21 through the testimony of other individuals, who relayed to jurors what N.B. had  
22 previously told them, which was ostensibly hearsay as it was offered as proof that  
23 Downs had in fact punched N.B. in his body at some previous point in time. *See, e.g.,*  
24 6/03/2015 Jury Trial Tr. at 691-93 (testimony from Detective Harms that N.B. had  
25 told him that Downs punched him with a closed fist).

26 Edwards’s wholesale failure to object to N.B.’s testimony via skype or to ensure  
27 that Downs had a meaningful opportunity to confront his accusers was objectively

1 unreasonable. There was no strategic reason not to ensure that Downs had a  
2 meaningful opportunity to undermine the factual allegations related to the various  
3 child abuse charges and more specifically the charge that he had committed the crime  
4 of child abuse by punching N.B. with a closed fist on his body. But for Edwards's  
5 failure to oppose N.B.'s testimony via skype and to effectively cross-examine N.B. or  
6 object to testimonial statements N.B. made to Detective Harms, there is a reasonable  
7 probability the outcome of Downs's underlying criminal proceedings would have been  
8 different.

9 Any contrary ruling by a state court was contrary to, or involved an  
10 unreasonable application of, clearly established federal law, and/or involved an  
11 unreasonable determination of the facts adduced in the state court record. *See* 28  
12 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

13 **Ground Seven: Counsel Edwards was ineffective both before and**  
14 **during trial, in violation of Downs's Sixth and Fourteenth Amendment**  
15 **rights to the effective assistance of counsel.**

16 Statement of Exhaustion:

17 These claims are unexhausted. All of these claims were raised in Mr. Downs  
18 pro per state post-conviction petition. See 6/04/2018 Pro Per Petition for Writ of  
19 Habeas Corpus (Post-Conviction). However, these court-appointed attorney Edward  
20 Reed abandoned these claims at the post-conviction evidentiary hearing. See  
21 2/10/2020 Tr. at 10. At this juncture, these claims are technically exhausted because  
22 if Downs were to return to state court to present these claims, the Nevada state courts  
23 would likely find that the claims are procedurally defaulted.  
24  
25  
26  
27

1 Statement of Facts in Support of Claim

2 **A. Failure to file a motion in limine or object to State's use of**  
3 **certain photographs**

4 At trial, photographs of N.B.'s injuries were introduced to jurors, which had  
5 been taken on or about May 16, 2013. See State's Trial Exhibits at 15-42. The State  
6 also presented a photograph of N.B. before he moved to Reno to contrast his physical  
7 states. State's Trial Exhibit 43.

8 Edwards did not object to the introduction of these photographs at trial nor did  
9 he file a motion in limine prior to trial to exclude these images. The prejudicial effect  
10 of the images outweighed their relevance, as Dr. Wagoner testified about the injuries  
11 she observed on N.B. and Bowser testified about the perceived emotional impact these  
12 injuries had on N.B. In fact, Edwards did not file any motions in limine or even oppose  
13 the State's motions in limine.

14 The failure to file a motion in limine was objectively unreasonable. But for  
15 Edwards's failure to file this motion, there is a reasonable probability that the  
16 outcome of Downs's underlying criminal proceedings would have been different.

17 Any contrary ruling by a state court was contrary to, or involved an  
18 unreasonable application of, clearly established federal law, and/or involved an  
19 unreasonable determination of the facts adduced in the state court record. *See* 28  
20 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

21 **B. Failed to interview and call certain witnesses for trial**

22 Upon information and belief, counsel for Downs failed to interview tenants who  
23 resided in MacGregor Units #229, #119, and #170 during the relevant time period.  
24 Had counsel done so, upon information and belief they would have discovered:

- 25 -the tenant residing in unit #229 did not hear anything unusual coming from  
26 Downs's apartment despite this tenant working from home;

1 -the first tenant residing in unit #119 reported to Detective Scott Johnson that  
2 he would occasionally hear a thump coming from Downs's apartment but never  
3 stated that he heard sounds akin to an animal or child being tortured, and the  
4 second tenant residing in #119 said the same;

5 -the tenant residing in unit #170 told Detective Scott Johnson that he had  
6 known Downs for 15 years and would have corroborated that N.B. self-abused,  
7 had extremely adverse reactions to bathing, was clumsy, had delusions, and  
8 would urinate on himself when fixating (as a result of N.B.'s ADHD)

9 -N.B.'s foster father who would have testified that N.B. was clumsy and that  
10 certain items in the foster home were removed due to this tendency

11 Upon information and belief, counsel's failure to interview and/or present these  
12 witnesses at trial prejudiced Downs; but for counsel's failures there is a reasonable  
13 probability that the outcome of Downs's underlying criminal proceedings would have  
14 been different.

15 Any contrary ruling by a state court was contrary to, or involved an  
16 unreasonable application of, clearly established federal law, and/or involved an  
17 unreasonable determination of the facts adduced in the state court record. *See* 28  
18 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

19 **C. Failure to retain specific experts**

20 Upon information and belief, or about April 14, 2014, Downs's second attorney  
21 (Ristenpart) received two expert reports, including one from Tara Godoy. In Tara  
22 Godoy's report, after reviewing some of N.B.'s medical records and the police reports,  
23 Ms. Godoy found that N.B.'s injuries could have been caused by other things. Edwards  
24 ended up calling Ms. Godoy at trial to testify about the possibility that N.B.'s injuries  
25 were attributable to normal child activities.

26 But Edwards failed to retain any expert who could testify about attention  
27 deficit and hyperactivity disorder in children N.B.'s age, and how it would explain

1 certain behaviors of N.B., like losing track of time and urinating on himself or being  
2 hyperactive and incurring more bruising than the average child. At the time of these  
3 incidents in Reno, upon information and belief, N.B. was without his prescription  
4 medication for ADHD, meaning the symptoms of his disorder would have been  
5 particularly acute. This combined with Alamo's neglect of N.B.—i.e., her failure to  
6 provide him with appropriate care for a special needs child—would have altered the  
7 narrative of the proceedings. There was not strategic reason not to present testimony  
8 from this type of expert and to introduce reasonable doubt as to whether the factual  
9 predicates for some or all of the charges against Downs amounted to actual abuse.  
10 But for Edwards's failure to retain this type of expert and present testimony from  
11 that expert, there is a reasonable probability that the outcome of Downs's underlying  
12 criminal proceedings would have been different.

13 Any contrary ruling by a state court was contrary to, or involved an  
14 unreasonable application of, clearly established federal law, and/or involved an  
15 unreasonable determination of the facts adduced in the state court record. *See* 28  
16 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

17 **D. Failure to test items purportedly for victim's DNA**

18 Upon information and belief, N.B. was swabbed for DNA, but at no point did  
19 police test the materials purportedly used to bind and gag N.B. for his DNA. Edwards  
20 was ineffective for failing to have these materials tested, which upon information and  
21 belief would have shown that N.B.'s DNA was not on the materials. It was objectively  
22 unreasonable for Edwards not to obtain and test these materials. But for this failure,  
23 there is a reasonable probability the outcome of Downs's underlying criminal  
24 proceedings would have been different.

25 Any contrary ruling by a state court was contrary to, or involved an  
26 unreasonable application of, clearly established federal law, and/or involved an  
27



1 unreasonable determination of the facts adduced in the state court record. See 28  
2 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

3 **E. Failure to investigate and present a defense that co-defendant**  
4 **Alamo was responsible for N.B.'s injuries and that Downs's**  
5 **alleged conduct did not amount to abuse under the relevant law**

6 Edwards failed to investigate or seek information relating to N.B.'s behavioral  
7 problems, his distaste for bathing as upon information and belief N.B. came to school  
8 smelling of urine and dirty, and co-defendant Alamo's seeming neglect of N.B. in  
9 California before he relocated with her to Reno. Edwards could have used this  
10 information to show that any bruising N.B. may have incurred from roughhousing  
11 with Downs was attributable to neglect by Alamo. In other words, to the extent that  
12 N.B. previously stated Downs punched him while roughhousing, this evidence could  
13 have been used to show that this was typical roughhousing and that Alamo's neglect  
14 of N.B. caused him to easily bruise and appear weak.

15 There was no strategic reason for counsel not to seek this information and to  
16 present this as a theory of defense to the child abuse charge based upon Downs  
17 punching N.B. and causing him substantial mental harm or bodily harm. But for  
18 Edwards's failure to seek out and present this information, there is a reasonable  
19 probability the outcome of Downs's underlying criminal proceedings would have been  
20 different.

21 Any contrary ruling by a state court was contrary to, or involved an  
22 unreasonable application of, clearly established federal law, and/or involved an  
23 unreasonable determination of the facts adduced in the state court record. See 28  
24 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

**Ground Eight: Counsel was ineffective during plea negotiations, in violation of Downs's right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.**

Statement of Exhaustion:

This claim is unexhausted. Downs raised this claim or a version of it in his pro per state post-conviction petition. *See* 6/04/2018 Pro Per Petition for Writ of Habeas Corpus (Post-Conviction). However, the court-appointed attorney Edward Reed abandoned the claim at the post-conviction evidentiary hearing. *See* 2/10/2020 Tr. at 10. At this juncture, this claim is technically exhausted because if Downs were to return to state court to present the claim, the Nevada state courts would likely find that the claim is procedurally defaulted.

Statement of Facts in Support of Claim:

The Sixth Amendment requires trial counsel to provide “effective assistance of counsel at critical stages of the criminal proceeding.” *Lafler v. Cooper*, 566 U.S. 156, 164 (2002). The right to the effective assistance of counsel extends to the plea-bargaining process, *id.* at 163, and a defendant has the right to make a reasonably informed decision whether to accept a plea offer. *See Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985). A defendant’s knowledge of the comparative sentence exposure between standing trial and accepting a plea offer will often be crucial to the decision whether to plead guilty. *United States v. Day*, 969 F.2d 39, 43 (3d. Cir. 1992).

To establish ineffective assistance of counsel where a defendant rejects a plea agreement and proceeds to trial, a habeas petitioner must show that trial counsel’s performance fell below an objectively reasonable standard and that the petitioner suffered prejudice as a result. *Lafler*, 566 U.S. at 174; *see also Strickland*, 466 U.S. at 687-88. To satisfy the prejudice prong of this test, a petitioner must show that “there is a reasonable probability that he and the trial court would have accepted the guilty plea,” and that “as a result of not accepting the plea and being convicted at trial,” the

1 petitioner received a sentence much greater than he would have received had he  
2 accepted the plea. *Lafler*, 566 U.S. at 174.

3 Downs took a plea offer upon the advice of his second attorney (Ristenpart),  
4 and then moved to withdraw that offer once counsel received a report from Tara  
5 Godoy that suggested some of N.B.'s injuries could have been attributable to normal  
6 childhood activities. Downs was advised by Ristenpart to accept the plea offer without  
7 having completed the investigation of the case. Once Ristenpart obtained the report,  
8 she advised Downs to withdraw his plea. Counsel's failures to fully investigate the  
9 charges before advising Downs to plead and then to advise him to withdraw his guilty  
10 plea based upon Ms. Godoy's report was patently ineffective. Given the nature of the  
11 charges against Downs and N.B.'s statements to police, the expert report of Ms. Godoy  
12 provided a possible defense to some of the child abuse charges, which she testified  
13 about during the trial, but that report did nothing to undermine N.B.'s statements  
14 that at some point during the two months he lived with Downs that Downs had bound  
15 his hands and legs and then carried him to the bathroom to submerge him in water.  
16 Because that was the factual basis for the kidnapping charge, and a conviction on  
17 first-degree kidnapping can result in a life sentence, it was patently ineffective for  
18 Ristenpart to advise her client to plead guilty and to then withdraw his plea based  
19 upon the report of Ms. Godoy. But for counsel's actions, Downs would have not sought  
20 to withdraw his original plea and would not have gone to trial.

21 Any contrary ruling by a state court was contrary to, or involved an  
22 unreasonable application of, clearly established federal law, and/or involved an  
23 unreasonable determination of the facts adduced in the state court record. *See* 28  
24 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

1 **Ground Nine: Counsel rendered ineffective assistance by failing to move to**  
2 **suppress statements that Downs made to Detective Doser and/or object to**  
3 **admitting the video recordings of this questioning at trial and playing the**  
4 **entire videos for the jury**

4 Statement of Exhaustion:

5 This claim is unexhausted. Downs raised these claims or a version of them in his  
6 pro per state post-conviction petition. *See* 6/04/2018 Pro Per Petition for Writ of  
7 Habeas Corpus (Post-Conviction). However, the court-appointed attorney Edward  
8 Reed, abandoned the claim at the post-conviction evidentiary hearing. *See* 2/10/2020  
9 Tr. at 10. At this juncture, the claims are technically exhausted because if Downs  
10 were to return to state court to present the claim, the Nevada state courts would  
11 likely find that the claim is procedurally defaulted.

12 Statement of Facts in Support of Claim:

13 Counsel's failure to file a suppression motion may be constitutionally  
14 ineffective where the record clearly shows that an attorney's failure to file a  
15 suppression motion is not due to trial strategy considerations but due to his failure  
16 to conduct any pretrial discovery. *Kimmelman v. Morrison*, 477 U.S. 365, 367 (1986).

17 Counsel was ineffective for failing to move to exclude the custodial  
18 interrogations of Downs on May 16 and May 21, 2013, and to exclude all inculpatory  
19 statements Downs made during those interviews (specifically that he may have had  
20 black outs where he inflicted injuries on N.B.), the latter of which ultimately came in  
21 through the testimony of Detective Doser. *See* 6/02/2015 Jury Trial Tr. at 443-455.  
22 Counsel was also ineffective for failing to object to the State playing the entire video  
23 recordings of each interview during trial.

24 On May 16, 2013, Detective Doser of the Reno Police Department interviewed  
25 Downs at the police station. State's Trial Exhibit 47. Doser testified that initially  
26 Downs was not a suspect, but Doser became increasingly suspicious of Downs during  
27 the interview. 6/02/2015 Jury Trial Transcript at 424. Yet, given the circumstances

1 of the incident, it is likely Downs was a suspect at the time he spoke with police on  
2 May 16, 2013. As an employee of the MacGregor Inn testified, after Ms. Alamo and  
3 N.B. moved in with Downs in March 2013, she began receiving nose complaints about  
4 what the tenant believed was an animal being abused in Mr. Downs apartment, but  
5 Ms. Phillips knew that Mr. Downs did not own a pet. 6/01/2015 Trial Transcript at  
6 303-304. That tenant complained to Ms. Phillips several times about banging, yelling  
7 and screaming. *Id.* at 305. Then the tenant next to Downs complained to ms. Phillips  
8 about yelling and crying. *Id.* at 307. Ms. Phillips had also seen N.B. a few times, and  
9 on May 16, 2013, Downs came with N.B. to the motel office. *Id.* at 309-310. On May  
10 21, 2013, again Detective Doser interviewed Downs. At the start of the interview, he  
11 told Downs that he was not under arrest and was free to leave. Yet, Doser had spoken  
12 to N.B and had engaged in another search of the apartment. State's Trial Exhibit 48.  
13 Given the totality of the circumstances of both interviews, Downs was not free to  
14 leave and he should have immediately been given a Miranda warning by Detective  
15 Doser.

16 During trial, this interview was admitted into evidence for the jurors to watch,  
17 which was unusual. Edwards did not object to playing the entire videos, which were  
18 roughly an hour long. 6/02/2015 Jury Trial Tr. at 453, 481.

19 Counsel was ineffective for failing to move to suppress Downs's inculpatory  
20 statements made during the interviews and for failing to object to these videos being  
21 published to the jury during trial. But for these failures, there is a reasonable  
22 probability that the outcome of Downs's underlying criminal proceedings would have  
23 been different.

24 Any contrary ruling by a state court was contrary to, or involved an  
25 unreasonable application of, clearly established federal law, and/or involved an  
26 unreasonable determination of the facts adduced in the state court record. *See* 28  
27 U.S.C. §§ 2254(d)(1) and (d)(2). Downs is entitled to relief.

**PRAYER FOR RELIEF**

Accordingly, Robert Downs II respectfully requests that this Court:

1. Issue a writ of habeas corpus to have Robert Downs II brought before the Court so that he may be discharged from his unconstitutional confinement;
2. Conduct an evidentiary hearing at which proof may be offered concerning the allegations in this amended petition and any defenses that may be raised by respondents; and
3. Grant such other and further relief as, in the interests of justice, may be appropriate.

Dated December 29, 2023.

Respectfully submitted,

Rene L. Valladares  
Federal Public Defender

*/s/ Alicia R. Intriago*

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Alicia R. Intriago  
Assistant Federal Public Defender

**DECLARATION UNDER PENALTY OF PERJURY**

I declare under penalty of perjury under the laws of the United States of America and the State of Nevada that the facts alleged in this petition are true and correct to the best of counsel's knowledge, information, and belief.

Dated December 29, 2023.

Respectfully submitted,

Rene L. Valladares  
Federal Public Defender

/s/ Alicia R. Intriago

Alicia R. Intriago  
Assistant Federal Public Defender